Supreme Court, U.S.
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No. 98-400

In The

Supreme Court of the United States

October Term, 1998

JAMES HOWARD SMITH, Trustee of the Estates of MARILYN A. HANSON and LYNNE M. RICE,

Petitioner,

vs.

LASER, WILSON, BUFORD & WATTS, P.C., SOUTHERN GUARANTY INSURANCE COMPANY; CONTINENTAL CASUALTY INSURANCE CO.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT SOUTHERN GUARANTY INSURANCE COMPANY

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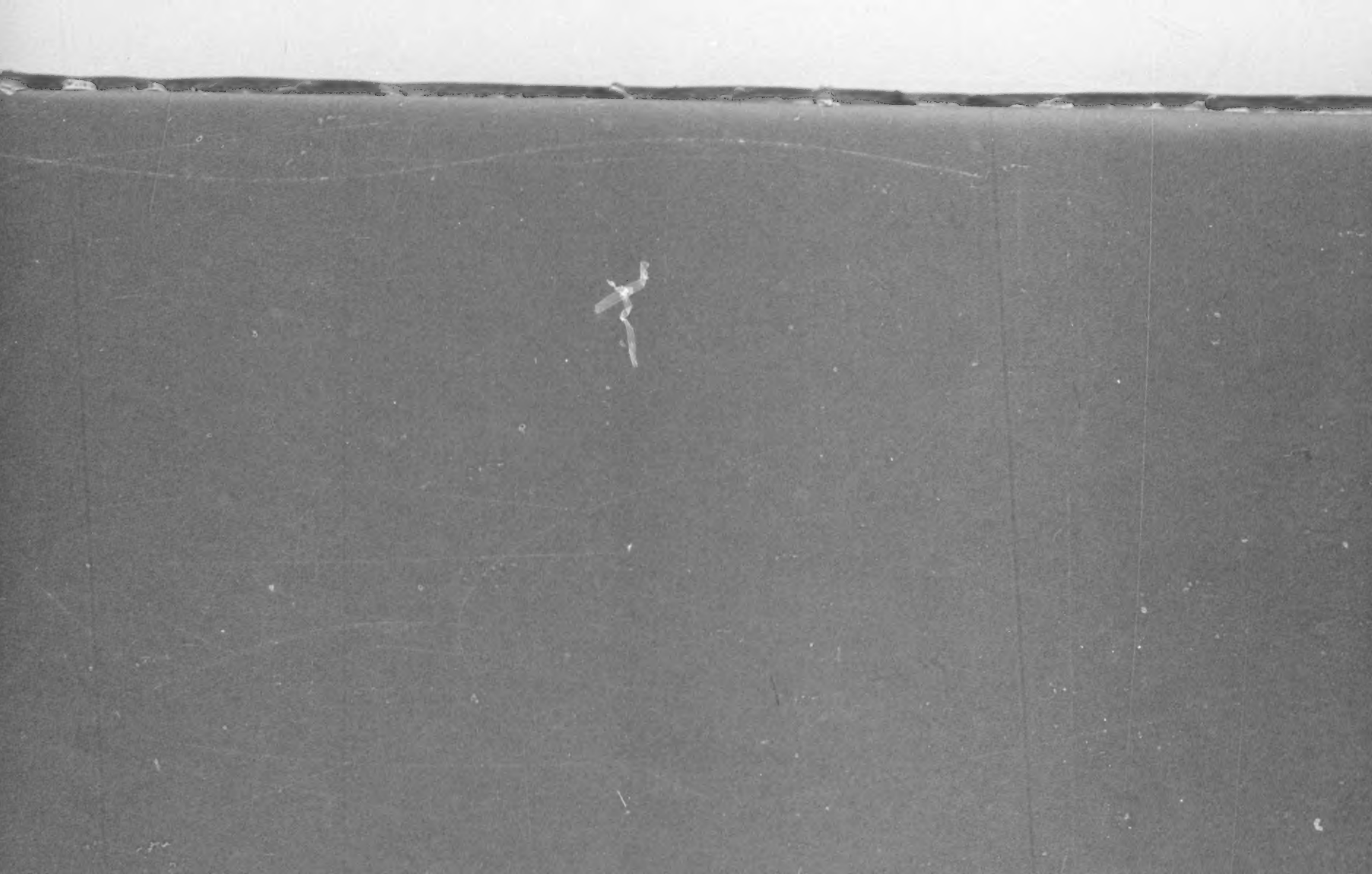

PARTIES TO THE PROCEEDINGS AND DISCLOSURE PURSUANT TO RULE 29.6

The parties to the proceeding are listed in their entirety in the caption of the case.

Separate Respondent Southern Guaranty Insurance Company has no nonwholly owned subsidiaries and is a wholly owned subsidiary of Winterthur Insurance International Incorporated.

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STATEMENT OF THE CASE

This case, in one form or another, is now in its fifth Court. The present Plaintiff/Petitioner, James Howard Smith, is the trustee in bankruptcy for Marilyn Hanson and Lynne Rice. Ms. Hanson and Ms. Rice owned a business known as Electronic Finders, Inc. (EFI). EFI had a general liability insurance policy with Southern Guaranty Insurance Company. Ms. Hanson and Ms. Rice had personal liability policies with separate Respondent Continental Casualty Insurance Company. Each policy contained an intentional acts exclusion.

Jerry Smith was employed by EFI as a salesman. At some point during his employment with EFI, Jerry Smith formed a competing business, without revealing the existence of this business to Ms. Hanson or Ms. Rice. Upon learning of Mr. Smith's competing business, Ms. Hanson and Ms. Rice terminated Jerry Smith's employment with EFI.

Subsequent to Jerry Smith's termination, Jeffrey Scott Metcalf and Chris Young broke into Jerry Smith's home, beating and threatening Mr. Smith and his wife, Brenda Smith.

In Jerry and Brenda Smith's Arkansas state court lawsuit (Appendix A hereto) against Marilyn Hanson, Lynne Rice, Jeffrey Metcalf, Chris Young, Southern Guaranty Insurance Company and Continental Casualty Insurance Company, the Smiths assert alternative allegations. First, that Hanson and Rice hired Metcalf and Young for the express purpose of beating Jerry Smith and Brenda Smith; or in the alternative, that Hanson and Rice made off hand remarks of ill will in reference to Jerry Smith in the presence of Metcalf and Young and that Metcalf and Young acted on these statements. The Complaint alleges that making these "off hand" remarks constitutes negligence.

Hanson and Rice demanded coverage from both Continental Casualty and Southern Guaranty. Continental Casualty denied the claim outright while Southern Guaranty provided a defense subject to a reservation of rights, engaging the firm of Laser, Wilson, Buford & Watts to provide that defense. The attorney assigned by the Laser firm to represent Hanson and Rice moved to dismiss the negligence count. That Motion (Petitioner's Appendix D) was granted, leaving only the intentional acts count. The insurance companies moved for Summary Judgment, arguing that intentional acts were specifically excluded under the policies. The state trial court granted that Motion. (*See* Petitioner's Appendix F).

Utilizing counsel other than the Laser firm, Hanson and Rice appealed to the Arkansas Supreme Court. Likewise, Jerry and Brenda Smith appealed to the Arkansas Supreme Court. The Smiths, Hanson and Rice argued to the Arkansas Supreme Court that the negligence count should not have been dismissed and that Summary Judgment should not have been granted on the coverage issues in favor of the insurance companies. The Arkansas Supreme Court affirmed the state trial court on these issues. The Arkansas Supreme Court's Opinion appears as Petitioner's Appendix G.

Hanson and Rice then filed personal bankruptcies. The present Petitioner, James Smith (the brother of the underlying Plaintiff, Jerry Smith), was appointed as the bankruptcy trustee. James Smith, in his capacity as trustee of the bankruptcy estates of Hanson and Rice, brought suit in the United States District Court for the Eastern District of Arkansas, Western Division, Case No. 96-950, against the Laser Law Firm, Southern Guaranty Insurance Company and Continental Casualty Insurance Company. This Complaint alleged that the Laser Law Firm committed malpractice in moving to dismiss the negligence count and that the insurance companies wrongly

denied coverage in the underlying state court action. The Federal District Court complaint is attached as Appendix B. All parties to the Federal action filed either a Motion to Dismiss or a Motion for Summary Judgment. The Federal trial court denied the Plaintiffs'/Bankruptcy Trustee's (Petitioners') Motion for Summary Judgment and granted the Defendants' (Respondents') Motions. In its Order granting the Defendants' (Respondents') Motions, the Federal trial court correctly stated that in order to prevail, the bankruptcy trustee (the present Petitioner, James Smith), must relitigate the issues of negligence and insurance coverage and that because those issues had been fully and fairly adjudicated by the state trial and appellate courts that the doctrines of *collateral estoppel* and "full faith and credit" prevented relitigation of those issues. The Federal trial court's Order is attached as Petitioner's Appendix C.

In an unreported decision, the United States Court of Appeals for the Eighth Circuit in Case No. 97-3294 EALR affirmed the trial court's ruling. (Petitioner's Appendix B) and the Petitioners' request for rehearing and rehearing *en banc* was denied. (Petitioner's Appendix A).

REASONS FOR DENYING THE WRIT

Rule 10 of the Rules of the Supreme Court of the United States reads in part:

> A Petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the **misapplication of a properly stated rule of law**.

The Petitioner argues only that if properly applied, the doctrine of *collateral estoppel* would not prevent relitigation of his claims against the Respondents. The Petitioner does not

argue that the doctrine of *collateral estoppel* is not a "properly stated rule of law." Therefore, the Petition should be denied.

Likewise, the Petition does not claim that the Eighth Circuit Court of Appeals' decision is in conflict with another United States Court of Appeal or that the Eighth Circuit Court of Appeals decided "an important federal question in a way that conflicts with a decision by a state court of last resort. . . .". Rule 10(a) of the Rules of the Supreme Court of the United States. Nor does the Petition demonstrate or even argue that the rulings of the District Court for the Eastern District of Arkansas or the Eighth Circuit Court of Appeals (Petitioner's Appendix B and C) decided "an important question of federal law that has not been but should be settled by this Court or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c) of the Rules of the Supreme Court of the United States.

Most importantly, the issue raised by the Petitioner does not involve the interpretation of a federal statute, rule or common law. As noted in the Petitioner's rather convoluted "QUESTION PRESENTED", the issue is whether proper application of *collateral estoppel* mandates Summary Judgment in favor of the Respondents. As discussed in this Respondent's "STATEMENT OF THE CASE", the Circuit Court of Pulaski County, Arkansas, decided that Respondent Southern Guaranty Insurance Company was entitled to Judgment as a matter of law on the issue of insurance coverage. (State trial court's Order appears as Petitioner's Appendix F). The Supreme Court of the State of Arkansas affirmed that decision. (State Supreme Court's opinion appears as Petitioner's Appendix G). Even though the next incarnation of the case was in the United States District Court, Arkansas rather than Federal law concerning *collateral estoppel* applies. In *Kremer v. Chemical Construction Corporation*, 456 U.S. 461, 72 L. Ed. 2d 262, 102 S. Ct. 1883 (1982), the United States Supreme Court stated:

> Section 1738 [28 U.S.C. § 1738] requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the state from which the judgments emerged.

456 U.S. at 466, 72 L. Ed. 2d at 270, 102 S. Ct. at 889. Further, the Court stated:

> It has long been established that § 1738 [28 U.S.C. § 1738] does not allow federal courts to employ their own rules of *res judicata* in determining the effect of state judgments. It goes beyond the common law and commands a federal court to accept the rules chosen by the state from which the judgment is taken. *McElmoyle v. Cohen*, 13 P.2d 312, 326, 10 L. Ed. 177 (1939).
>
> . . .
>
> Congress has specifically required all federal courts to give preclusive effect to state court judgments whenever the courts of the state from which the judgment emerged would do so. [*Allen v. McCurry*, 449 U.S. at 96, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980)].

456 U.S. at 481-82, 72 L. Ed. 2d at 280, 102 S. Ct. at 1898.

Because Hanson and Rice litigated the issue of insurance coverage at the state trial court and at the Arkansas Supreme Court, it is undisputed that they cannot relitigate that issue in the courts of Arkansas. *Estate of Goston v. Ford Motor Co.*, 320 Ark. 699, 898 S.W. 2d 471 (1995); *Crockett & Brown, P.A. v. Wilson*, 314 Ark. 578, 864 S.W. 2d 244 (1993).

Therefore, under the holding announced in *Kremer*, Hanson and Rice may not (personally or through their bankruptcy trustee) relitigate insurance coverage in federal court.

The Petitioner seems to argue that Hanson and Rice are somehow excused from the rule of *collateral estoppel* because allegedly their state court trial counsel (separate Respondent Laser Law Firm) filed the Motion to Dismiss the negligence allegation without informing Hanson and Rice of any possible adverse consequences on coverage afforded by the Respondent insurance companies. This contention misses the mark for a very important reason. Hanson and Rice were represented by private counsel (Dale Adams and Mike Lebeouff), not just the Laser Firm, and Hanson's and Rice's personal counsel vigorously litigated the coverage issue. *See* decision of the Arkansas Supreme Court, Petitioners' Appendix G.

CONCLUSION

The Petitioner has failed to demonstrate any reason consistent with Rule 10 of the Rules of the Supreme Court for the granting of a Writ of Certiorari. Further, on its face, the Petition is merely an argument that the Court misapplied a properly stated rule of law. There has been no deprivation of due process, substantive or procedural. For these reasons, the Petition should be denied.

Respectfuly submitted,

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APPENDIX

APPENDIX A — SECOND AMENDED COMPLAINT TO THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS, SEVENTH DIVISION DATED JUNE 21, 1994

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
SEVENTH DIVISION

NO. 93-3929

JERRY SMITH and BRENDA SMITH

PLAINTIFFS

VS.

MARILYN HANSEN, LYNNE RICE, JEFFERY SCOTT METCALF and CHRIS YOUNG, SOUTHERN GUARANTY INSURANCE CO., and CONTINENTAL CASUALTY CO.

DEFENDANTS

SECOND AMENDED COMPLAINT

Come the Plaintiffs, Jerry Smith and Brenda Smith, by and through their attorney, R. David Lewis, and for their cause of action against the defendants state and allege as follows.

1. This court has jurisdiction as all parties are residents of Pulaski County, Arkansas and all acts alleged herein occurred in Pulaski County, Arkansas.

Appendix A

COUNT ONE — BATTERY

2. On July 3, 1992, the plaintiffs were beaten and robbed by defendants Young and Metcalf, as they had been hired to do by defendants Rice and Hansen, because Jerry Smith had gone into competition with Hansen and Rice. These acts constitute assault and battery by all four defendants. Defendants Young and Metcalf tied up the plaintiffs, stole cash, stole their vehicle, and terrorized the plaintiffs, causing them physical and severe mental anguish, damaging them in a sum exceeding the jurisdictional limits for diversity cases in federal district court. The acts of all four defendants were malicious and felonious, justifying punitive damages in a sum exceeding the jurisdictional limits for diversity cases in federal district court. These acts constitute battery by all four defendants.

COUNT TWO — OUTRAGE

3. Plaintiffs incorporate the allegations in the preceding paragraphs. Defendants Young and Metcalf tied up the plaintiffs, stole cash, stole the vehicle, terrorized the plaintiffs, causing them physical and mental anguish, all at the request of Hansen and Rice, which damaged them in a sum exceeding the jurisdictional limits for diversity cases in federal district court. The aforesaid acts of defendants were outrageous, were so extreme in degree as to go beyond all possible bounds if decency and to be regarded as atrocious and utterly intolerable in civilized society. These acts caused emotional stress which was justified under the circumstances and was so severe that no person could be expected to endure it.

4. The acts of all four defendants, as alleged above, were malicious and felonious, justifying punitive damages in a sum

exceeding the jurisdictional limits for diversity cases in federal district court.

COUNT THREE — NEGLIGENCE

5. In the alternative, the acts of Hansen and Rice were negligent in that Hansen and Rice negligently suggested to Chris Young and Scott Metcalf that they would like to see the plaintiffs frightened or their car damaged on their tires slashed and wanted the Smiths followed. This is reckless and negligent because Chris Young was a felon and Scott Metcalf was easily lead by Chris Young. Together, Metcalf and Young beat and robbed the plaintiffs, which was far beyond the scope of what Hansen and Rice had asked them to do, but asking them to do anything was negligence and recklessness. Hansen and Rice felt and expressed malice and extreme dislike for Jerry Smith.

COUNT FOUR — DECLARATORY JUDGMENT

6. Southern Guaranty Insurance Company insured one or more of the defendants but seeks to avoid liability because it contends the acts of its insured were intentional and could not arise out of a business purpose, these being the exclusions under the policy, as it was a business policy. Continental Casualty Insurance Company insured one or more of the defendants at the time of the incident complained of but refuses to defend or pay because it contends that the acts of its insured were intentional and were for a business purpose which is an exclusion under Continental Casualty's policy. It is necessary that these insurance companies be brought into this action for a declaratory judgment as to their liability, to determine whether the acts of Marilyn Hansen and Lynne Rice were intentional or negligent, to determine whether the acts of Hansen and Rice

were related to a business purpose or not, to determine which insurance company should pay and defend, or whether either of them should pay and defend.

WHEREFORE, as to Counts One through Three, plaintiffs pray for judgment against the defendants, and each of them, for compensatory and punitive damages each of which exceeds the jurisdictional limits for diversity cases in federal district court and with regard to Count Four, Plaintiffs pray that this court enter a declaratory judgment determining that one or both of the insurance companies named as defendants has a duty to defend and pay any judgment in this case, for costs, attorney's fees, and other good and proper relief.

Respectfully submitted,

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APPENDIX B — COMPLAINT TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

NO. _____

JAMES HOWARD SMITH, TRUSTEE OF THE ESTATES OF MARILYN A. HANSON AND LYNNE M. RICE

PLAINTIFF

VS.

LASER, WILSON, BUFORD & WATTS, P.A., SOUTHERN GUARANTY INSURANCE COMPANY AND CONTINENTAL CASUALTY INSURANCE COMPANY

DEFENDANTS

COMPLAINT

Comes the plaintiff, James Howard Smith, Chapter 7 Trustee of the Estates of Marilyn A. Hanson and Lynne M. Rice, and for his cause of action against the defendants, Laser, Wilson, Buford & Watts, P.A., Southern Guaranty Insurance Company and Continental Casualty Insurance Company, states:

1. Plaintiff, James Howard Smith, is a citizen and resident of Little Rock, Pulaski County, Arkansas, and he is the duly elected, qualified and acting chapter 7 Trustee of the Estates of Marilyn A. Hanson ("Hanson") and Lynne M. Rice ("Rice"),

Debtors, whose separate Chapter 7 bankruptcy cases are pending in the United States Bankruptcy Court, Eastern District, Little Rock Division.

2. Defendant Laser, Wilson, Buford & Watts, P.A. ("Laser Firm") is a Professional Association comprised of attorneys at law duly authorized to practice law in the State of Arkansas, and it is organized and existing under the laws of the State of Arkansas, with its principal place of business and its registered agent for service located in Little Rock, Pulaski County, Arkansas. Defendant Southern Guaranty Insurance Company ("Southern Guaranty") is an insurance company organized and existing under the laws of the State of Alabama, duly qualified as a foreign corporation to conduct insurance business in the State of Arkansas, with its registered agent for service in this state located in Pulaski County, Arkansas. Defendant, Continental Casualty Insurance Company ("Continental Casualty") is an insurance company organized and existing under the laws of the State of Illinois, duly qualified as a foreign corporation to conduct insurance business in the State of Arkansas, with its registered agent for service in this state located in Pulaski County, Arkansas.

3. As a result of the conduct of the three named defendants, as set forth herein, debtors Hanson and Rice have been damaged. The causes of action of Hanson and Rice against the three defendants are assets of the two debtors; respective bankruptcy estates, and the causes of action must be prosecuted by the chapter 7 Trustee, as the only and real party in interest.

4. This court has jurisdiction of the parties and the subject matter of this action pursuant to 28 U.S.C. §1334. and the case arises under and relates to 11 U.S.C. §§323(b), 541 and 704, and Rule 6009 of the Rules of Bankruptcy Procedure.

5. On June 29, 1993, Jerry Smith and Brenda Smith, his wife, ("the Smiths"), citizens and residents of Little Rock, Pulaski county, Arkansas, filed a law suit in the Circuit Court of Pulaski County, Arkansas against Hanson and Rice and two of their occasional employees Chris Young ("Young") and Jeffrey Scott Metcalf ("Metcalf"). The lawsuit sought the recovery of damages for assault and battery, and for punitive damages, alleging that Young and Metcalf robbed and beat the Smiths in the Smiths' own home at 4:00 a.m. on July 3, 1992, and that they had been hired to do so by Hanson and Rice. The complaint was later amended to include the alternative allegations of the torts of outrage and negligence, alleging that it was negligent for Hanson and Rice to communicate to Young and Metcalf their hatred for the Smiths and their desire that they be injured or their property damaged. Jerry Smith had once worked as a salesman of medical supplies at the business owned by Hanson and Rice, an Arkansas corporation named Electronic Finders, Inc. ("EFI"), located in Little Rock, Pulaski County, Arkansas. Young was a convicted felon, having been released from the Arkansas Department of Correction a few weeks prior to the beating incident that occurred on July 3, 1992. Young had a sister, Rosalyn Young Lemon, who was a full time employee of EFI, and both Young and Metcalf worked occasionally for EFI and also for Hanson and Rice in their personal individual capacities.

6. Rice admitted making angry statements about Jerry Smith in the presence of Young and his sister, including how she wouldn't mind seeing Jerry Smith hurt, and Hanson admitted making angry statements about Jerry Smith in the presence of Young and his sister, including not minding seeing his property damaged. However, both Hanson and Rice contended they did not employ Young or Metcalf to do the

robbery or beating, and further contended that they knew nothing about the robbery or beating until after the incident had occurred.

7. Southern Guaranty and Continental Casualty were also sued because each insured Hanson and/or Rice for $1,000,000, Southern Guaranty on a business policy, and Continental Casualty on a home owner's policy. The action against the insurance companies was for a declaratory judgment that there was coverage. Southern Guaranty hired the Little Rock, Arkansas law firm of Barber, McCaskill, Amsler, Jones and Hale to represent itself, and it hired the Laser Firm to represent Hanson and Rice. Continental Casualty employed the Little Rock, Arkansas law firm of Wright, Lindsey and Jennings to represent itself, and refused to furnish a defense for Hanson or Rice, contending that the acts of Hanson and Rice were intentional, and that intentional conduct was expressly excluded from coverage. Southern Guaranty also defended on the ground that the acts of Hanson and Rice were intentional, that their policy likewise excluded coverage for intentional conduct and the alleged conduct was not business related.

8. Prior to the trial of the case, the Laser Firm, as counsel for Hanson and Rice, filed a motion on July 1, 1994, to dismiss the Smiths' negligence claim. At a hearing in chambers held a few days before trial, the Circuit Court granted the motion, and the case proceeded to trial only on the intentional conduct counts of battery, outrage and punitive damages.

9. At the trial, held on July 22, 1994, the jury found that Hanson an Rice through their agents committed battery and outrage against the Smiths and awarded each of them $250,000.00 in compensatory damages and $500,000.00 in

punitive damages against Hanson and against Rice, for a total award of $3,000,00.00. The jury further awarded each of the Smiths $25,000.00 in compensatory damages and $50,000.00 in punitive damages against Young and $1 in compensatory damages and $1 in punitive damages each against Metcalf.

10. The jury was not allowed to decide the disputed fact question of whether the Smiths' injuries were the proximate result of Hanson and Rice intentionally hiring Young and Metcalf to do the beating, or whether the injuries were the proximate result of mere negligence on the part of Hanson and Rice in making the angry statements in the presence of Young and his sister. There were facts in the case from which the jury could have found that Hanson and Rice did not employ Young and Metcalf, and that the Smiths' injuries were the proximate result of mere negligence on the part of Hanson and Rice, for which there would be coverage under one or the other of the two insurance policies. The jury could also have decided the disputed fact question of whether the negligent acts related to a "business purpose," so that a determination could have been made as to which policy provided coverage. Had the jury been allowed to determine whether the acts were negligent or intentional, and had the jury believed the debtors' version of the facts, that there was mere negligence, there would have been coverage, the availability of a bankruptcy discharge and the likelihood of a smaller verdict.

11. On motion by Hanson and Rice for remittitur, the trial court reduced each compensatory award from $250,000.00 to $100,000.00. Following the trial, the trial court also granted summary judgment in favor of Southern Guaranty and Continental Casualty on the grounds that the jury found that Hanson and Rice acted intentionally and intentional conduct was expressly excluded from coverage.

12. On August 11, 1994, Hanson filed a voluntary petition for relief under Chapter 13 of Title 11 of the United States Code, in Case No. 94-41508S.

13. On August 13, 1994, Rice filed a voluntary petition for relief under Chapter 13 of Title 11 of the United States Code, in Case No. 94-41518S.

14. Each of their cases was converted to Chapter 7 from Chapter 13 on October 25, 1994, by Order of the Bankruptcy Court. On November 29, 1994, plaintiff, James Howard Smith, was appointed Chapter 7 Trustee in both cases.

15. Orders were entered in each of the two bankruptcy cases that the Judgment in favor of Jerry and Brenda Smith was nondischargeable pursuant to 11 U.S.C. §523(a)(6), which excepts from discharge debts that arise from willful and malicious injury.

16. Jerry and Brenda Smith appealed on the trial court's dismissal of the negligence claim and the order of remittitur. The Arkansas Supreme Court affirmed the dismissal of the negligence claim and reversed the order of remittitur, reinstating the original compensatory verdicts of $250,000.00. *Jerry Smith, et al v. Marilyn Hansen (sic), et al*, 323 Ark. 188, 914 S.W.2d 285 (1996).

17. The plaintiff Chapter 7 Trustee owns the causes of action of Hanson and Rice. This action is related to the underlying bankruptcy cases, for its resolution will have a direct and substantial impact on the asset pool available for distribution to the bankruptcy estates.

Appendix B

18. The complaint the Smiths filed against Hanson and Rice stated allegations which fell within the policy coverage set forth in the policies of both defendant insurance companies. The policy of Southern Guaranty reads as follows, and the Continental Casualty policy is believed by plaintiffs to contain substantially similar provisions:

> We will pay the sums that the insured becomes legally obligated to pay as damages because of "bodily injury," "property damage," "personal injury," or "advertising injury" to which this insurance applies. . . . We will have the right and duty to defend and "suit" seeking those damages. . . . This insurance does not apply to: a. "Bodily injury," or "property damage" expected or intended from the standpoint of the insured.

19. Under the allegations of the complaint filed by the Smiths, both insurance companies had a duty to defend the suit.

20. Defendant Continental Casualty wrongfully and in bad faith breached its duty to defend, breached its duty to hire independent counsel for its insureds, and grossly disregarded the interests of its own insureds, in an oppressive attempt to avoid its just obligations under the policy. Defendant Continental Casualty is therefore bound by the judgment. Defendant Continental Casualty is liable to the plaintiff Chapter 7 Trustee for the $3,000,000.00 judgment, and because of its bad faith and reckless disregard for the rights of its insureds, it is also liable to the plaintiff Trustee for punitive damages to be set by the jury.

21. Defendant Southern Guaranty wrongfully and in bad faith:

a. Failed to inform its insureds of the conflict of interest raised by the motion to dismiss the negligence count, i.e., that Southern Guaranty's interests were that the negligence case be dismissed and the case tried on intentional counts only, and Hanson's and Rice's interests were that the negligence case not be dismissed, so that if there were a verdict that it might be on the grounds of negligence and not intentional conduct.

b. Failed to pay for Hanson and Rice to employ independent counsel of their own choosing as a result of the aforementioned conflict of interest.

c. Engaged in affirmative, oppressive and malicious misconduct to actively prevent its insureds from having an opportunity to have the jury determine the disputed fact question of whether the insureds acted intentionally, or whether their conduct was mere negligence.

d. Failed and refused to settle the claim of the injured parties, when an offer of settlement was offered within the policy limits.

e. Grossly disregarded the interests of its own insureds, and subordinated the insureds' interests to that of its own in defense of the case.

22. Defendant Southern Guaranty is liable for the further reasons because of negligence and breach of fiduciary duty of the Laser Firm hired by Southern Guaranty to represent Hanson

and Rice as set forth below. For all the reasons herein set forth, defendant Southern Guaranty is bound by the judgment. Defendant Southern Guaranty is liable to the plaintiff Chapter 7 Trustee for the $3,000,000.00 judgment, and because of its bad faith and reckless disregard for the rights of its insureds, it is also liable to the plaintiff Trustee for punitive damages to be set by the jury.

23. Defendant Laser Firm was negligent and breached its fiduciary duty to Hanson and Rice in conducting the defense in the following particulars, to wit:

a. Failing to make a realistic evaluation of the case.

b. Subordinating the interests of Hanson and Rice to that of Southern Guaranty, and giving no consideration to the best interests of Hanson and Rice.

c. Failing to convey knowledge of a settlement offer within the policy limits of Southern Guaranty to their clients Hanson and Rice.

e. Refusing to settle the case, when a settlement offer was made within the policy limits.

f. Failing to recommend to Southern Guaranty that it settle the case, when a settlement offer was made within the policy limits.

g. Failing to inform Hanson and Rice of the conflict of interest raised by the filing of the motion to dismiss the negligence count.

h. Failing to inform Southern Guaranty of the conflict of interest raised by the filing of the motion to dismiss the negligence count.

i. Failing to recommend to Southern Guaranty that it should employ separate independent counsel of Hanson's and Rice's own choosing as a result of the conflict raised by the filing of the motion to dismiss the negligence count.

j. Actively seeking dismissal of the negligence count purportedly on behalf of Hanson and Rice, when such motion was directly contrary to Hanson's and Rice's best interests and directly contrary to Hanson's and Rice's sworn version of facts, that is, that the angry statements were mere negligence for which there was coverage.

k. Actively preventing their own clients, Hanson and Rice, from having an opportunity to have the disputed fact question of negligence decided by the jury.

l. Advancing a spurious argument to the trial court in the motion to dismiss the negligence count that "no special relation" existed between the insureds and their occasional employees, Young and Metcalf. That argument was not true, and it was contrary to undisputed facts in the case. The advancement of that argument, and the acceptance of it by the trial court, was a fraud upon the interests of Hanson and Rice because the argument was not true. There was in fact a

"special relation": Young and Metcalf both worked for the insureds' business, EFI, on an occasional basis, and both of them also worked occasionally for the insureds in their personal, individual capacity. EFI and the two women were both of those mens' only sources of income; they were getting to work only on an occasional basis; and they both were destitute and practically starving to death. It was a grievous and unconscionable act for the Laser Firm to advance an argument to the trial court that was not true, that was not supported by the facts, and that was directly contrary to the best interests of the clients that the Laser Firm was supposed to be representing.

m. Assigning the case for trial to an attorney who had never had a civil trial before.

n. Failing to exercise the requisite degree of skill and expertise normally held by attorneys admitted to practice law in the community in the conduct of the trial held on July 22, 1994, i.e. failing to call material witnesses to testify who the insureds had wanted called; failing to advance the insureds' theories of the case, that is negligence; and failing to offer any explanation to the jury as to why the insureds had sought and received immunity in the previous criminal trial of their co-defendant Young.

24. For the reasons set forth herein, defendant Laser Firm is liable to the plaintiff Trustee for the $3,000,000.00 judgment,

and because of its oppressive misconduct and its reckless disregard for the rights of its clients, it is also liable to the plaintiff Trustee for punitive damages to be set by the jury.

25. Plaintiff Trustee, on November 19, 1996, prior to the commencement of this action, demanded the payment of the $3,000,000.00 judgment from defendants, but defendants refused and still refuse to comply.

26. Plaintiff demands trial by jury on all issues in this case.

WHEREFORE, plaintiff, as such Trustee, prays judgment against defendants, the Laser Firm, Southern Guaranty Insurance Company, and Continental Casualty Insurance Company, jointly and severally, for compensatory damages in the sum of Three Million Dollars ($3,000,000.00), with interest thereon at the rate of eight percent (8%) per annum from July 22, 1994 (that is $657.53 per day); for punitive damages against each of the defendants, jointly and severally, in an amount to be set by the jury; for his costs, reasonable attorney's fees, and all other proper relief.

Respectfully submitted,

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